

SATISFYING THE DUTY TO BARGAIN¹ DURING THE TERM OF A COLLECTIVE BARGAINING AGREEMENT RELATIVE TO CONDITIONS OF EMPLOYMENT NOT COVERED BY² THE AGREEMENT

The stated purpose³ of the Labor Management Relations Act is to promote collective bargaining and reduce industrial strife for the benefit of the public interest. To accomplish this end, the act specifically provides that both management⁴ and labor⁵ have a duty to bargain collectively. Collective bargaining includes:

1. A basic premise of Labor Law is that management need not bargain about those things which are inherently within management's power. These are referred to as management "functions," "rights" or "prerogatives." "The corporate or other structure of the business, the size and personnel of the official and supervisory force, general business practices, the products to be manufactured, the location of plants, the schedules of production, the methods and processes and means of manufacturing appear to be such subjects." CCH, 1963 Guidebook To Labor Relations 268. Determination of the scope of management functions thus has a direct bearing on management's duty to bargain. Analysis of the scope of management prerogatives in itself could be the topic of a law review note. See Nelson, *Management Prerogatives and the Work-Rules Controversy*, 11 LAB. L. J. 987 (1960). For the purpose of this note, management functions is limited to the manner in which it is treated in *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960), so that the reader may have a clearer understanding of this note.

In that case the collective bargaining agreement provided for arbitration of "differences . . . as to the meaning and application of the provisions of this Agreement, or . . . any local trouble of any kind," *id.* at 576, but excepted matters which are strictly a function of management. A group of employees filed a grievance protesting that the employer had violated the agreement by contracting-out to other firms maintenance work which had in the past been done by company employees, some of whom were already laid off because of lack of work. The district court, 168 F. Supp. 702 (S.D. Ala. 1958), upheld the company's contention that the matter was within the "function of management" clause and declined to compel arbitration of the grievance. The decision was affirmed by the Court of Appeals. 269 F.2d 633 (5th Cir. 1959). The Supreme Court reversed, holding that the agreement did not expressly define contracting-out as a function of management, and exceptions to a general arbitration clause must be explicit.

In describing "strictly a function of management," Mr. Justice Douglas said that it "might be thought to refer to any practice of management in which, under particular circumstances prescribed by the agreement, it is permitted to indulge." 363 U.S. at 584. It must be interpreted, he continued, "as referring only to that over which the *contract* gives management complete control and unfettered discretion." *Id.* at 584. [Emphasis added.]

This description of management functions is unfair to management. Presumably, no collective bargaining contract deals either expressly or by necessary implication with every management prerogative. The *Gulf & Warrior* case might

the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in *good faith* with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, *but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . .*⁶

Where a collective bargaining agreement exists, to bargain collectively also means that "no party to such contract shall terminate or modify such contract . . ." Moreover, there is no duty to discuss any such "modification" if it is to take effect before the termination of the existing contract.⁸

force companies to bargain even about those functions which in the past were unquestionably within management's exclusive control simply because they were not included in the contract which contains a broad grievance clause and a "general" management functions clause. For explanation of meaning of "broad" grievance clause and "general" management functions clause see section I, C *infra*. This case may do more to disrupt collective bargaining than to foster it. A fear could be instilled in management of losing its right to manage. An "open mind" attitude by management might be frustrated when approaching the negotiating table. Moreover, the depreciation of management's powers might lead to long and cumbersome agreements creating confusion in interpretation and application.

2. The phrase "covered by"

includes terms and conditions of employment (1) which are explicitly and unambiguously spelled out in the contract; or (2) as to which there are questions of contract interpretation; or (3) which are fixed by the particularization of a general rule contained in the agreement; or (4) which must be implied to give the agreement its obvious meaning. Cox & Dunlop, *The Duty to Bargain Collectively during the Term of an Existing Agreement*, 63 HARV. L. REV. 1097, 1098 n.3 (1950).

3. It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce. Labor Management Relations Act (Taft-Hartley Act) § 1(b), 61 Stat. 136 (1947), 29 U.S.C. § 141(b) (1958) [hereinafter cited as U.S.C.]

4. "It shall be an unfair labor practice for an employer—(5) to refuse to bargain collectively with the representatives of his employees. . . ." U.S.C. § 158(a) (5).

5. "It shall be an unfair labor practice for a labor organization or its agents—(3) to refuse to bargain collectively with an employer . . ." U.S.C. § 158(b) (3).

6. U.S.C. § 158(d). [Emphasis added.]

7. U.S.C. § 158(d).

8. [T]he duties so imposed shall not be construed as requiring either party

During the term of a contract, the collective bargaining process is primarily concerned with settling grievances relating to the interpretation and application of the agreement. However, disputes might arise over matters collateral to the interpretation or application of the written instrument, which are not "covered by" the contract.⁹

Until 1949 the question of whether there is a duty to bargain over terms not covered by the labor contract had never been raised. In two National Labor Relations Board decisions¹⁰ that year, however, the following rule was established and is settled law today:

As to the written terms of the contract either party may refuse to bargain further about them, under the limitations set forth in . . . [Section 8(d)] without committing an unfair labor practice. With respect to unwritten terms dealing with "wages, hours and other terms and conditions of employment," the obligation remains on both parties to bargain continuously.¹¹

The purpose of this note is to illustrate how the parties to a collective bargaining agreement can satisfy their statutory duty to bargain during the term of the agreement relative to subjects not covered therein. This note will also consider the impact of a strike or a union slowdown on this duty.

I. SATISFYING THE DUTY TO BARGAIN DURING THE CONTRACT TERM

A. *Discussing Subjects at Contract Negotiations*

One familiar with the subject of collective bargaining under the act might assume that neither management nor labor is obligated to bargain during the term of the contract concerning matters that were discussed at precontract negotiations but were not incorporated into the written instrument. Section 8 (d)'s standard relating to this

to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. U.S.C. § 158(d).

9. See note 2 *supra*. Typical situations not "covered by" the contract are as follows: (1) The company has maintained group insurance for its employees for many years, but no provision has ever been made for it in the labor contracts between the company and the union. During the current contract the union submits a request to bargain about changes in the insurance plan. (2) During the term of the current contract an invention in the industry makes it desirable from an economic standpoint for the company to make a change in the manufacturing process, which will displace certain employees. There is nothing in the contract which specifically provides for the settlement of any question arising out of such change.

10. Tide Water Associated Oil Co., 85 N.L.R.B. 1096 (1949); Allied Mills, Inc., 82 N.L.R.B. 854 (1949).

11. Tide Water Associated Oil Co., 85 N.L.R.B. 1096, 1099-1100 (1949).

question, however, has met with inconsistent application by the N.L.R.B. A definite answer, therefore, cannot be easily rendered.

*Jacobs Mfg. Co.*²² evinces the Board's first opinion on this issue. During contract negotiations in 1948, the company and the union discussed changes in an existing insurance program, agreeing to increase certain benefits as well as costs. Neither the resulting changes nor the insurance program itself, however, were incorporated in the contract. When the union invoked the reopening clause concerning wages in 1949, it demanded, *inter alia*, that the company undertake the entire cost of the existing group insurance program. The company refused to discuss the union's insurance requests. Pursuant to a union complaint, a majority of the Board upheld the company's position, thus rejecting an obligation to bargain on this point. It was concluded as a matter of fact that the subject of group insurance was "fully discussed" and "consciously explored" during contract negotiations.

The Board's conclusion is consonant with section 8 (d)'s standard, which requires the parties to the contract to meet at reasonable times and confer in good faith but does not compel either party to agree to a proposal or to make a concession. In subsequent cases, however, the Board, in deciding whether or not the duty to bargain has been satisfied, has used phrases like "fully discussed" or "consciously yielded," establishing a standard that requires something more of the parties than the statutory minimum.²³

12. 94 N.L.R.B. 1215 (1951).

13. *Press Co.*, 121 N.L.R.B. 976 (1958); *Beacon Piece Dyeing & Finishing Co.*, 121 N.L.R.B. 953 (1958). The *Press Co.* case illustrates the erroneous result which occurs when too much emphasis is placed on the extent to which the parties must go in their discussion of a subject not subsequently incorporated into the written instrument. The union and the company had been in disagreement over the matter of commissions. The union argued that the subject of commissions should be included in the bargaining agreement; the company rejected the proposal as an invasion of management's prerogative. The parties eventually agreed at their last precontract bargaining session upon the inclusion of a clause reading, "there shall be no cuts in basic salary during the term of this agreement." *Id.* at 987 n. 16. They agreed that the clause did not encompass the subject of commissions. While the contract was in effect, the company unilaterally announced that its solicitors would no longer be paid commissions. The union filed an unfair labor practice charge. The Board held that:

It is well established Board precedent that, although a subject has been discussed in precontract negotiations and has not been specifically covered in the resulting contract, the employer violates Section 8 (a) (5) of the Act if during the contract term he refuses to bargain, or takes unilateral action with respect to the particular subject, unless it can be said from an evaluation of the prior negotiations that the matter was "fully discussed" or "consciously explored" and the union "consciously yielded" or clearly and unmistakably waived its interest in the matter. *Id.* at 977-78.

Jacobs Mfg. Co., 94 N.L.R.B. 1214 (1951), *International News Serv. Div. of the Hearst Corp.*, 113 N.L.R.B. 1067 (1955) and *Tide Water Associated Oil Co.*,

It has been the Board's position¹⁴ that a lesser standard would lead to industrial strife by inhibiting the collective bargaining process. This approach, however, requires a complete recording of everything said at the negotiation conferences. Otherwise it would not be possible to verify full discussion of the subject and conscious yielding by one party. Moreover, the Board has acknowledged the undesirability of a word-for-word recordation, when it is necessary for the parties to express themselves freely.¹⁵ Indeed, the Board has interpreted such a demand as indicative of bad faith bargaining.¹⁶

When the subject not covered in the agreement was discussed before the contract was executed, and the union expressly or impliedly agreed either not to press the particular point or to withdraw it, the duty to bargain about that specific subject for the term of the labor contract has been satisfied. The union has made its bargain. A standard which requires a finding of conscious yielding or full discussion violates the plain meaning of the Act. The obligation to bargain "does not compel either party to agree to a proposal or require the making of a concession: . . ."¹⁷

85 N.L.R.B. 1096 (1949) were cited as the precedent-setting authorities.

It is submitted that these "precedent-setting" authorities were improperly and erroneously applied to the issue in *Press Co.* Agreeably, *Jacobs* held that the question of insurance had been "fully discussed" and "consciously explored." To be sure in the *INS* case, the union "consciously yielded" in the face of the company's objection and accepted something less than it originally proposed. But these were findings of *fact* and not conclusions of law. Therefore, these findings cannot be considered as establishing some minimum standard for satisfying the duty to bargain. *Tide Water* held that the vaguely phrased management rights clause of the collective bargaining agreement would not support a waiver of bargaining rights over a retirement allowance plan. There must be a "clear and unmistakable" waiver, said the Board. *Tide Water Associated Oil Co.*, *supra* at 1098. This standard, correctly applied to the interpretation of a contractual provision, is not pertinent to a situation where precontract discussion of a subject waives the right to bargain about it during the term of the contract. The statutory right to bargain is not to be easily avoided by the shrewd pen of a management lawyer. On the other hand the union should not be allowed to harass the company with demands to bargain about an issue which has been discussed at precontract negotiations and, through the give-and-take which followed, has been omitted from the subsequent integration. The statutory requirement of management in 8(a)(5) and unions in 8(b)(3) to bargain in good faith is exceeded by establishing the *Press Co.* standard. This decision posits that since the parties were not in agreement, the subject was not within the unilateral control of the company. The Board, under the guise of determining a waiver or no waiver of right to bargain, is thus in a position to exercise considerable influence on the substantive terms about which the parties contract.

14. *Press Co.*, *supra* note 13.

15. *Reed & Prince Mfg. Co.*, 96 N.L.R.B. 850 (1951), *enforced*, 205 F.2d 131 (1st Cir.), *cert. denied*, 346 U.S. 887 (1953).

16. *Id.* at 854.

17. 29 U.S.C. § 158(d).

B. Incorporation of a Wrap-up Clause into the Collective Bargaining Agreement

Difficulties involved in satisfying the interim duty to bargain by precontract discussion of terms not subsequently embodied in the written agreement have led to the incorporation of waiver provisions in the labor contract.¹⁸ However, as the Board¹⁹ and the courts²⁰ have often said, no effect will be given a purported waiver of such right unless it is expressed in clear and unequivocal language. Contracting parties, for example, may expressly stipulate that the company has the right to determine merit increases;²¹ that individual bargaining for terms better than those in the contract is authorized;²² that contracting-out is within the discretion of management.²³ On the other hand, waiver of bargaining rights with respect to a particular item does not by implication waive rights on other bargainable issues.²⁴ Nor will the Board acknowledge a purported waiver through a vaguely phrased management functions clause.²⁵

A dispute concerning a matter not otherwise covered by²⁶ the collective bargaining agreement may be obviated, however, by the inclusion of a "wrap-up" clause. The specific purpose of such a clause is to foreclose bargaining on all matters during the term of the contract save employee grievances. The following "wrap-up" clause is illustrative:

18. *E.g.* Borden Co., Maricopa Div., 110 N.L.R.B. 802 (1954); California Portland Cement Co., 101 N.L.R.B. 1436 (1952); Phelps Dodge Copper Prods. Corp., 96 N.L.R.B. 982 (1951); Brunswick Drug Co., 96 N.L.R.B. 451 (1951); Midland Broadcasting Co., 93 N.L.R.B. 455 (1951); General Controls Co., 88 N.L.R.B. 1341 (1950); The Berkline Corp., 123 N.L.R.B. 685 (1959).

19. Gulf Atlantic Warehouse Co., 129 N.L.R.B. 42 (1960); Beacon Piece & Dyeing Co., 121 N.L.R.B. 953 (1958); Speidel Corp., 120 N.L.R.B. 733 (1958); The Item Co., 108 N.L.R.B. 1634 (1954); California Portland Cement Co., 101 N.L.R.B. 1436 (1952); Phelps Dodge Copper Prods. Corp., 96 N.L.R.B. 982 (1951); Tide Water Associated Oil Co., 85 N.L.R.B. 1096 (1949).

20. N.L.R.B. v. The Item Co., 220 F.2d 956 (5th Cir. 1955), *enforcing*, 108 N.L.R.B. 1634; N.L.R.B. v. Trimfit, Inc., 211 F.2d 206 (9th Cir. 1954), *enforcing*, 101 N.L.R.B. 706 (1952). N.L.R.B. v. Geigy Co., 211 F.2d 553 (9th Cir. 1954), *modifying & enforcing*, 99 N.L.R.B. 822 (1952).

21. The Item Co., 108 N.L.R.B. 1634 (1954); General Controls Co., 88 N.L.R.B. 1341 (1950).

22. Midland Broadcasting Co., 93 N.L.R.B. 455 (1951).

23. Hughes Tool Co., 100 N.L.R.B. 208 (1952).

24. N.L.R.B. v. The Item Co., 220 F.2d 956 (5th Cir. 1955), *enforcing*, 108 N.L.R.B. 1634, wherein the court held the union did not waive its statutory right to insist upon disclosure by the employer of information as to merit increases granted employees, by contractually committing the prerogative of granting merit increases solely to the employer's discretion.

25. Tide Water Associated Oil Co., 85 N.L.R.B. 1096 (1949).

26. Cox & Dunlop, *supra* note 1.

The parties hereto specifically waive *any* rights which either may have to bargain with the other during the life of the Agreement between the parties, as heretofore and hereby modified and extended, on any matter pertaining to rates of pay, hours or other terms and conditions of employment *whether or not covered by such Agreement. . . .*²⁷

Subject matter brought about by unanticipated technological change poses a salient question. Does a "wrap-up" clause foreclose the right to bargain concerning this subject? Unfortunately this question has not been litigated before the Board. The discussion in the next subsection supports the proposition that the company would be under a duty to bargain.²⁸

27. Phelps Dodge Copper Prods. Corp., 96 N.L.R.B. 982, 986 (1951) (emphasis added). Similar contract clauses were impliedly recognized by the Board as a general waiver of bargaining rights. *Borden Co., Maricopa Div.*, 110 N.L.R.B. 802 (1954); *Brunswick Drug Co.*, 96 N.L.R.B. 451 (1951). Since the union merely charged the company with refusal to bargain over union security in *Brunswick* and delivery schedules in *Borden*, it was not necessary to say more than that the "wrap-up" clause manifested a clear intention by the parties that the subjects of union security and delivery schedules should be foreclosed. If the charge had to do with some other subjects, it appears obvious that the Board would have similarly interpreted the clause as waiving the parties' rights to bargain. In fact, in the preliminary report in *Borden* the hearing examiner commented that both parties had waived all rights to bargain during the contract term.

California Portland Cement Co., 101 N.L.R.B. 1436 (1952) interpreted a similar contract provision, which reads:

This Labor Agreement and the Pension Agreement together contain all the obligations of, and restrictions imposed upon, each of the parties during their respective terms.

It is the intent of the parties by these two agreements to have settled all issues between them and all collective bargaining obligations for the term of the Labor Agreement . . . prior to the expiration thereof except by mutual written consent and except as provided in Section 2 of Article X of the Pension Agreement. *Id.* at 1438-39.

The union was held not to have waived its right to information concerning classifications and salaries of all monthly salaried employees. This opinion, however, may neither be read as a revocation of the efficacy of a "wrap-up" clause nor as a restriction on specific waiver. It was found as a matter of fact that the union needed this information in order to administer the contract properly. Furthermore, the contract contained provisions requiring the disclosure by the company of other information (not including that in issue), and although the company contended that this gave rise to an implied waiver, the Board held that the contract was *vague* on this point. Finally, the contract clause, which the company argued foreclosed bargaining relative to the information desired by the union, did not evince an intent that *all* matters, *whether covered by the agreement or not*, were to be waived.

28. It is one thing to waive rights granted under a statute with respect to subjects one is presumed to comprehend; an entirely different situation is presented, however, with respect to a technological invention, bringing change about which the union could have had no understanding.

C. *Standing on the Contract Grievance Machinery*

Most collective bargaining agreements provide a grievance procedure for the settlement of disputes. During the term of the agreement, an offer to follow the contract grievance procedure satisfies the duty to bargain collectively with respect to a question to which the contract grievance procedure might apply.²⁹ The Board will dismiss a complaint charging a violation of the duty to bargain when the question of the propriety of the respondent's conduct raises issues submissible to established grievance machinery.³⁰

A question is presented concerning the subjects covered by the contract grievance procedure. The manner in which the contract grievance clause is cast determines the answer. The purview of a grievance clause generally takes two forms; one broad in scope, the other narrow. The "broad" form is illustrated by the following clause:

Should differences arise between the Company and the Union or its members employed by the Company as to the meaning and application of the provisions of this Agreement, or *should any local trouble of any kind arise . . .* an earnest effort shall be made to settle such differences immediately in the following manner: . . .³¹

The "narrow" grievance clause might read, "Any disputes, misunderstandings, differences or grievances arising between the parties as to the meaning, interpretation and application of the provisions of this agreement, . . . may be submitted to the [grievance machinery]."³²

The "narrow" type clause limits grievances to disputes concerning interpretation and application of the agreement, while controversies

Another and practical problem presented by the "wrap-up" clause involves potential labor unrest because of the employees' inability to have their proposals represented to the employer at interim bargaining sessions. It is for this reason that employers who can afford it establish a department within the business organization specifically responsible for maintaining a good employer-employee relationship.

29. See *Westinghouse Elec. Corp.*, 113 N.L.R.B. 954 (1955); *United Tel. Co.*, 112 N.L.R.B. 779 (1955); *McDonnell Aircraft Corp.*, 109 N.L.R.B. 930 (1954). *But see* *Standard Oil Co.*, 92 N.L.R.B. 227 (1950), *remanded*, 196 F.2d 892 (6th Cir. 1952); *Timken Roller Bearing Co.*, 70 N.L.R.B. 500 (1946), *enforcement denied*, 161 F.2d 949 (6th Cir. 1947).

30. *Westinghouse Elec. Corp.*, 113 N.L.R.B. 954 (1955) (employer denied union right of access to the plant for the purpose of "job analysis"); *McDonnell Aircraft Corp.*, 109 N.L.R.B. 930 (1954) (company unilaterally assigned clerical work to employees not included in the appropriate contractual unit); *Crown Zellerbach Corp.*, 95 N.L.R.B. 753 (1951) (employer unilaterally changed the contract piece rate in order to compensate for new and improved equipment).

31. *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 576 (1960). [Emphasis added.]

32. *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 565 n.1 (1960).

concerning terms or conditions not "covered by"³³ the agreement are not subject to the grievance procedure.³⁴ Satisfaction of the statutory obligation to bargain is now cast in a different mold. The duty is to bargain at large.³⁵ Representatives of both parties should meet and confer on the subject until a solution is found or agreement cannot be reached after good faith bargaining. Unilateral action by the company prior to satisfying the duty to bargain is a ground for an unfair labor practice citation.³⁶ If the company, however, bargained with the union in good faith prior to acting, but an agreement could not be reached, it would have satisfied its statutory duty.³⁷ The statutory duty is similarly satisfied if the company notifies the union of an impending change and the union does not seek to negotiate the question.

A contract grievance clause cast in broad form subjects any question not foreclosed by precontract conference discussions, or by the contract itself, to the grievance machinery.³⁸ If a contract does not include contracting-out within its terms, but the grievance clause is broad in scope, the issue of contracting-out would have to be submitted to the contract grievance machinery before any other action is taken by the company in order to satisfy the duty to bargain.

The grievance procedure in many collective bargaining agreements provides, as a final step, for arbitration of issues not satisfied in intermediate steps. It might, therefore, be assumed that when the contract provides for arbitration, the issue must be submitted in order to satisfy the duty to bargain. Arbitrability, however, does not relate to satisfying the duty to bargain as closely as it relates to maintaining or breaching the contract. Refusal to arbitrate, even when it has been agreed that the particular matter at issue should be subject to

33. See note 2 *supra*.

34. Bemis Bros. Bag Co., 96 N.L.R.B. 728 (1951); Pan Am. Airways, Inc., 13 Lab. Arb. 189 (1949); Bliss & Laughlin, Inc., 11 Lab. Arb. 858 (1948).

35. Jacobs Mfg. Co., 94 N.L.R.B. 1214 (1951).

36. N.L.R.B. v. Katz, 369 U.S. 736 (1962), *reversing* 289 F.2d 700 (2d Cir. 1961); N.L.R.B. v. American Nat'l Ins. Co., 343 U.S. 395 (1952); N.L.R.B. v. Crompton-Highland Mills, Inc., 337 U.S. 217 (1949); N.L.R.B. v. Proof Co., 242 F.2d 560 (7th Cir. 1957); Servette, Inc., 133 N.L.R.B. 132 (1961); "M" Systems, Inc., 129 N.L.R.B. 527 (1960); Laabs, Inc., 128 N.L.R.B. 374 (1960); Oriole Motor Coach Lines, 114 N.L.R.B. 808 (1955); Armstrong & Hand, Inc., 104 N.L.R.B. 420 (1953); Texas Foundries, Inc., 101 N.L.R.B. 1642 (1952).

37. N.L.R.B. v. United Brass Works, Inc., 287 F.2d 689 (4th Cir. 1961); N.L.R.B. v. Intracoastal Terminal, Inc., 286 F.2d 954 (5th Cir. 1961); Adm. Rul. SR-1052, 47 L.R.R.M. 1165 (1960); Adm. Rul. SR-939, 47 L.R.R.M. 1035 (1960); Adm. Rul. SR-114, 44 L.R.R.M. 1541 (1959).

38. Standard Oil Co. (Ind.), 14 Lab. Arb. 516 (1950); *cf.* Textron, Inc. (Esmond Mills), 12 Lab. Arb. 475 (1949).

arbitration, is not itself violative of the statutory duty to bargain.³⁹ The legislative history of the Labor Management Relations Act is revealing. The bill as originally passed in the Senate, would have made it an unfair labor practice "to violate the terms of . . . an agreement to submit a labor dispute to arbitration."⁴⁰ This proposal, however, was rejected in conference.

The Senate amendment contained a provision which . . . would have made it an unfair labor practice to violate the terms of . . . an agreement to submit a labor dispute to arbitration. The conference agreement omits this provision of the Senate amendment. Once parties have made a collective bargaining contract the enforcement of that contract should be left to the usual processes of the law and not to the . . . Board.⁴¹

II. THE EFFECT OF A STRIKE OR SLOWDOWNS ON THE DUTY TO BARGAIN

A. *Strikes*

Suppose instead of utilizing the contract grievance machinery (when the grievance clause is in "broad" form) or bargaining at large, the union resorts to strike action to compel the company to accede to demands not "covered by" the contract. Does this constitute a refusal to bargain by the union? Two cases involving the United Mine Workers of America illustrate this problem. The first⁴² case concerned a dispute over application of seniority in filling newly available jobs. In the past when new machines requiring different skills had been installed, it had been the company's policy to upgrade its employees and train them in operating the new equipment. In this instance, however, the company hired two men from "outside" rather than train union employees to operate the machines. The union struck in retaliation. An unfair labor practice charge was filed by the company and upheld by the Board. The Court of Appeals for the District of Columbia reversed the order and held that, even if the strike was in breach of the contract (it was not), that factor, itself, would not constitute an unfair labor practice.⁴³

The second⁴⁴ case arose simultaneously. The union struck in reac-

39. United Tel. Co., 112 N.L.R.B. 779 (1955); Textron Puerto Rico (Tricot Div.), 107 N.L.R.B. 583 (1953). *But see* International Union, UMW, 117 N.L.R.B. 1072 (1957), *rev'd*, 257 F.2d 211 (D. C. Cir. 1958).

40. NATIONAL LABOR REGULATIONS BOARD, 1 LEGISLATIVE HISTORY OF THE LMRA, 114 (1948).

41. *Id.* at 545.

42. International Union, UMW v. N.L.R.B., 257 F.2d 211 (D.C. Cir. 1958), *reversing*, 117 N.L.R.B. 1095 (1957).

43. *Ibid.* See 1 NATIONAL LABOR RELATIONS BOARD, *op. cit. supra* note 36, at 114, 545.

44. International Union, UMW, 117 N.L.R.B. 1072 (1957), *rev'd*, 258 F.2d 146 (8th Cir. 1958).

tion to an arbitration finding that two union employees were not entitled to shift seniority under the contract. The Board upheld the company's complaint indicating that the union was attempting to modify the contract without first complying with the requirements of section 8 (d). The Eighth Circuit overturned⁴⁵ this holding, reasoning: "Assuming that a strike against an umpire's decision respecting . . . seniority would be a violation of contractual provisions making such a decision binding, it would not be a strike for the purpose of modifying the Agreement itself."⁴⁶

These two cases clearly indicate that if the union strikes during collective bargaining negotiations to gain a favorable position, this does not relieve the company of its duty to bargain with the union.

It has been held⁴⁷ that a union's strike, even assuming that it violates a no-strike clause of the labor contract, does not of itself constitute a refusal to bargain. Considering the question from the position of management, what is the company's obligation in regard to satisfying its duty to bargain in this situation? This question was answered by the Sixth Circuit in *Timken Roller Bearing Co. v. N.L.R.B.*⁴⁸ A company's promise to negotiate if the breach of contract is repaired, the men put back to work and grievances filed according to the contract, constitutes an offer reasonably in pursuit of the bargaining process.⁴⁹ The company could also retaliate by shutting down the plant for a reasonable length of time as a disciplinary measure⁵⁰ or refuse to bargain in regard to matters related to the strike for its duration.⁵¹

The discussion thus far has been of situations in which the company has not influenced the strike by unfair labor practices. The parties' relationship under the act, however, is altered by a strike precipitated by the employer's unfair labor practice. Although section 8 (d) (4) circumscribes⁵² the period during which a union cannot strike, it

45. Local No. 9735, *UMW v. N.L.R.B.*, 258 F.2d 146 (8th Cir. 1958).

46. *Id.* at 148-49.

47. Local 2647, *Lumber & Sawmill Workers*, 130 N.L.R.B. 235 (1961); Adm. Rul. 1080, 35 L.R.R.M. 1450 (1954).

48. 161 F.2d 949 (6th Cir. 1947), *reversing* 70 N.L.R.B. 500 (1946).

49. *Id.* at 955.

50. *Dorsey Trailers, Inc.*, 80 N.L.R.B. 478 (1948).

51. *United Elastic Corp.*, 84 N.L.R.B. 768 (1949); *Charles E. Reed & Co.*, 76 N.L.R.B. 548 (1948).

52. The applicable portion of 8(d) states:

[W]here there is in effect a collective-bargaining contract . . . no party to such a contract shall terminate or modify such contract, unless the party desiring such termination or modification— . . . (4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later: . . . 29 U.S.C. § 158 (d) (1958).

has no application to this kind of retaliatory strike action. The ambit of section 8 (d) (4) is limited in scope to "economic" strikes in the area of contract modification or termination.⁵³ The right of employees to strike in resistance to unfair labor practices is fundamental and recognized by the statute.⁵⁴ Otherwise an employer would have an unfair advantage. The right to resist such practices would be unequal between employees working under a collective bargaining agreement and those who were not and between unions who were satisfied with the existing contract and those who were not. Such employee disability would not only undermine primary objectives of the act, but would be in derogation of its legislative history.⁵⁵ Indeed Congress envisioned the retaliatory strike as a means of inhibiting an employer's unfair labor practice.

B. Concerted Slowdowns

The act neither specifically prohibits nor approves the use of concerted slowdowns and other harassing tactics short of strike to force the employer's hand during negotiations.⁵⁶ The Supreme Court in *N.L.R.B. v. Insurance Agents' Int'l Union*,⁵⁷ speaking through Mr. Justice Brennan, held the use of economic pressure not to be inconsistent with the duty of bargaining in good faith,⁵⁸ even though the union's harassing tactics were unprotected under the act.⁵⁹

53. *Mastro Plastics Corp. v. N.L.R.B.*, 350 U.S. 270 (1956); *H. N. Thayer Co.*, 99 N.L.R.B. 1122 (1952).

54. 29 U.S.C. § 157 (1958).

55. S. REP. No. 105, 80th Cong., 1st Sess. 24 (1947); H. R. REP. No. 510, 80th Cong., 1st Sess. 34-35 (1947); S. REP. No. 105, 80th Cong., 1st Sess. 21-22 (1947); 93 CONG. REC. 4036, 6385, 6503 (1947). *But see*, S. Rep. No. 105 (Minority), 80th Cong., 1st Sess. 21-22 (1947).

56. See *Local 232, U.A.W. v. Wisconsin Employment Relations Board*, 336 U.S. 245 (1949), wherein the Court concludes that the silence of the federal statute does not deny the state the power, in governing her internal affairs, to regulate an activity of this type having an obviously coercive effect.

57. 361 U.S. 477 (1960).

58. *Id.* at 490-91. *Accord*, *Local 220, I.U.E.*, 127 N.L.R.B. 1514 (1960). The court in *Insurance Agents* says: "The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized." *Id.* at 489.

The Board had held in three cases that the use of economic pressure was inconsistent with the duty to bargain in good faith. *Insurance Agents' Int'l Union*, 119 N.L.R.B. 768 (1957); *International Union, United Mine Workers*, 117 N.L.R.B. 1095 (1957), *set aside*, 257 F.2d 211 (D.C. Cir. 1958); *Textile Workers Union of America, CIO*, 108 N.L.R.B. 743 (1954), *set aside*, 227 F.2d 409 (D.C. Cir. 1955), *cert. denied*, 352 U.S. 864 (1956).

59. Section 7 of the LMRA amendment states:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of

Although concerted slowdowns are not necessarily antithetical to good faith bargaining, neither are such actions within its spirit. In fact, "an exertion of 'economic pressure' may at the same time be part of a concerted effort to evade or disrupt a normal course of negotiations."⁶⁰ The majority opinion, however, implies that such economic pressure is *ipso facto* consistent with good faith bargaining.

The Court, in *Insurance Agents*, framed the issue in the following manner:

(W) hether the Board may find that a union, *which confers with an employer with the desire of reaching agreement* on contract terms, has nevertheless refused to bargain collectively . . . solely and simply because during the negotiations it seeks to put economic pressure on the employer to yield to its bargaining demands by sponsoring on-the-job conduct designed to interfere with the carrying on of the employer's business.⁶¹

collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3). 29 U.S.C. § 157 (1958).

For cases in which concerted union activity was not protected under this section see *Caterpillar Tractor Co. v. N.L.R.B.*, 230 F.2d 357 (7th Cir. 1956); *Textile Workers Union, CIO*, 108 N.L.R.B. 743 (1954), *set aside on other grounds*, 227 F.2d 409 (D.C. Cir. 1955); *Charles E. Reed & Co.*, 76 N.L.R.B. 548 (1948).

60. *N.L.R.B. v. Insurance Agents' Int'l Union*, 361 U.S. 477, 505 (1960) (separate opinion of Frankfurter, J., which Harlan and Whittaker, JJ. join).

61. 361 U.S. 477, 479 (1960). (Emphasis added.) When the case was before the Board, it made the following findings of fact and rulings of law:

In the present case, the Respondent's reliance upon harassing tactics during the course of negotiations for the avowed purpose of compelling the Company to capitulate to its terms is the antithesis of reasoned discussion it was duty-bound to follow. Indeed, it clearly revealed an unwillingness to submit its demands to the consideration of the bargaining table where argument, persuasion, and the free interchange of views could take place. In such circumstances, the fact that the Respondent (union) continued to confer with the Company and was desirous of concluding an agreement does not *alone* establish that it fulfilled its obligation to bargain in good faith, as the Respondent argues and the Trial Examiner believes. At most, it demonstrates that the Respondent was prepared to go through the motions of bargaining while relying upon a campaign of harassing tactics to disrupt the Company's business to achieve acceptance of its contractual demands. If an employer in the course of negotiations threatens to shut down his plant or to cut hours of work or to stop overtime, in order to force a union to accede to his proposals and abandon its own demands there can be no doubt, under established Board law as enforced by the courts, that the employer thereby is not engaging in the genuine good-faith bargaining required by the Act. Similarly, here, the Respondent's conduct does not evidence an open and fair mind to reach agreement on the basis of free exchange of ideas which is essential to good-faith bargaining. By the same token, it is unnecessary to show, as the Respondent urges, that this conduct actually affected the negotiations or the Company's business. It is sufficient that this conduct reflected an attitude not to engage in the free give-and-take of good-faith bargaining. 119 N.L.R.B. 768, 770-71 (1957).

Therefore, in overruling the Board's decision (which was affirmed per curiam by the D.C. Circuit) the Supreme Court had to find that the union's harassing

The majority opinion assumes that which is in issue. The question is whether such activity indicates the absence of an open mind and sincere desire of reaching agreement on contract terms.⁶² *Insurance Agents* stands for no more than the principle that union directed concerted slowdowns and other harassing tactics are not *per se* violative of the duty to bargain. Good faith bargaining is a question of fact to be determined in each case on the totality of the relevant evidence.⁶³

CONCLUSION

Satisfying the duty to bargain during the term of a contract may be accomplished in several ways. The parties to the contract might have discussed a particular subject at contract negotiations and failed to include it in the written agreement. The Board has in a few cases required something more than mere discussion—a finding of “conscious yielding” by one party. In other cases mere discussion at pre-contract sessions has been deemed adequate. Although language of the Act supports the latter, final settlement of this issue must await review by the Supreme Court.

The parties to the labor contract may agree on a “wrap-up” clause which seeks to foreclose bargaining during the contract term. Such a device might, however, be unsatisfactory. First, although the wrap-up clause is legitimate, it is in derogation of the spirit of the LMRA—to foster collective bargaining. Second, the Board has not decided whether a wrap-up clause obviates bargaining about a technological change which affects working conditions. Since the Board requires a “clear and unequivocal” waiver by contractual stipulation, the logical result would be that this standard is not satisfied in the specific situation mentioned. Third, management’s invocation of a wrap-up clause to avoid bargaining might be viewed by the employees as demonstrative of bad faith. This, in turn, could lead to industrial strife.

New subjects arising during the term of the agreement might be anticipated by the parties and provision made for bargaining through the grievance-arbitration procedure. The scope of grievance-arbitration should not, however, be enlarged to the extent that management’s inherent powers are destroyed. Stabilization of relations between management and unions will not be achieved by Board and court decisions which take away legitimate management prerogatives.

tactics, as a matter of law, did not manifest the absence of a “free and open mind,” at the bargaining table.

62. Cf. *N.L.R.B. v. American Nat’l Ins. Co.*, 343 U.S. 395 (1952); *H. J. Heinz Co. v. N.L.R.B.*, 311 U.S. 514 (1941).

63. *N.L.R.B. v. American Nat’l Ins. Co.*, 343 U.S. 395 (1952).

Although there might not be inconsistency between a genuine desire to come to an agreement and use of economic pressure to obtain the desired agreement, such action should be closely analyzed in the context of the totality of circumstances to determine whether there has been good faith bargaining.

No attempt has been made to exhaust the ways in which the duty to bargain may be satisfied in an interim situation. Ultimately, satisfaction of the statutory duty is to a large extent restricted only by the imagination of the contracting parties.

